

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

I. INTRODUCTION

In this Social Security case, Plaintiff, David Chavez (“Plaintiff”) brings an action pursuant to 42 U.S.C. § 405(g) appealing a final decision by the Commissioner of Social Security which denied his claims for disability insurance under Title II of the Social Security Act (42 U.S.C. § 400 et seq.) for the time period beginning on May 19, 2004. Presently before the Court are cross-motions for summary judgment brought by Plaintiff and Defendant Jo Anne Barnhart, Commissioner of the Social Security Administration (“Defendant”).¹ For the reasons set forth below, the Court Denies Plaintiff’s Motion for Summary Judgment and Grants Defendant’s Cross- Motion for Summary Judgment.

¹The holding of this court is limited to the facts and the particular circumstances underlying the present motion.

1 **II. LEGAL STANDARDS**

2 **A. Standard for Reviewing the Commissioner's Decision**

3 Pursuant to 42 U.S.C. § 405(g), this court has the authority to review the Commissioner's
4 decision to deny benefits. The Commissioner's decision will be disturbed only if it is not
5 supported by substantial evidence, or if it is based upon the application of improper legal
6 standards. *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992). Substantial evidence is
7 "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept
8 as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting
9 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). When determining whether
10 substantial evidence exists to support the ALJ's decision, the court examines the administrative
11 record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at
12 1257. Where evidence exists to support more than one rational interpretation, the court must
13 defer to the decision of the ALJ. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995). The trier
14 of fact, and not the reviewing court, must resolve conflicts in the evidence, and if the evidence
15 can support either outcome, the court may not substitute its judgment for that of the
16 Commissioner. *Gomez v. Chater*, 74 F.3d 967, 970 (9th Cir. 1996).

17 Finally, "[a] decision of the ALJ will not be reversed for errors that are harmless." *Burch*
18 *v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). Remand is the appropriate remedy where
19 additional administrative proceedings could remedy defects. *Bilby v. Schweiker*, 762 F.2d 716,
20 719 (9th Cir. 1985). If, however, a rehearing would simply delay payment of benefits, reversal is
21 appropriate. *Id.*

22 **B. Standard for Determining Disability**

23 The Social Security Act provides benefits to qualified individuals who are disabled. 42
24 U.S.C. § 423(a)(1). Disability is defined as the "inability to engage in any substantial gainful
25 activity by reason of any medically determinable physical or mental impairment which is
26 expected to result in death or which has lasted or is expected to last for a continuous period of at
27 least twelve months." 42 U.S.C. § 423(d)(1)(A). An impairment for purposes of this definition
28 "results from anatomical, physiological, or psychological abnormalities which are demonstrable

1 by medically acceptable clinical and laboratory diagnostic techniques.” 42 U.S.C. § 423(d)(3).
2 In addition, a person is disabled only if the impairment is so severe as to preclude not only
3 performance of his previous work, but also, considering his age, education and work experience,
4 performance of any other kind of substantial gainful work which exists in the national economy.
5 42 U.S.C. § 423(d)(2)(A). The claimant carries the burden of proving disability. *Ukolov v.*
6 *Barnhart*, 420 F.3d 1002, 1004 (9th Cir. 2005).

7 The Commissioner follows a five-step sequential evaluation process in determining
8 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; *Lester v. Chater*, 81 F.3d 821,
9 828 n.5 (9th Cir. 1995), *as amended* April 9, 1996. First, the Commissioner determines whether
10 the claimant is engaged in “substantial gainful activity.” *Id.* If so, the claimant is not disabled,
11 and the claim is denied. *Id.* If the claimant is not engaged in such activity, the Commissioner
12 proceeds to step two and determines whether the claimant has a medically severe impairment or
13 combination of impairments; if not, the claim is denied. *Id.* If the claimant has a severe
14 impairment or combination of impairments, the third step requires the Commissioner to
15 determine whether the impairment meets or equals an impairment listed in 20 C.F.R., Part 404,
16 Subpart P, Appendix 1; if so, disability benefits are automatically awarded. *Id.* If the
17 impairment is not one presumed to be disabling, the fourth step requires the Commissioner to
18 determine whether the claimant has sufficient Residual Functional Capacity (“RFC”) to perform
19 his past relevant work; if so, the claim is denied. *Id.* The plaintiff has the burden of proving that
20 he or she is unable to perform past relevant work. *Drouin*, 966 F.2d at 1257. If the claimant
21 meets this burden, a *prima facie* case of disability is established. *Id.* In step five, the burden
22 shifts to the Commissioner to prove that the claimant, based upon his age, education, work
23 experience, and RFC, can perform other substantial gainful work. 20 C.F.R. §§ 404.1520,
24 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 141-42 (1987).

25 To disregard the uncontradicted opinion of a treating physician, an ALJ must provide
26 clear and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996). If a
27 treating physician’s opinion is contradicted by a non-treating doctor, the treating physician’s
28 opinion may be rejected only for “specific and legitimate reasons” supported by substantial

1 evidence in the record. *Id.*

2 Similarly, when a claimant has “produced medical evidence of underlying impairments
 3 consistent with his complaints and there is no affirmative evidence that he is malingering, the
 4 ALJ's reasons for rejecting [the claimant's] testimony must be clear and convincing.”

5 *Regennitter v. Commissioner of Social Sec. Admin.*, 166 F.3d 1294, 1296 (9th Cir. 1999).

6 Additionally, ALJ must articulate specific reasons for rejecting the claimant's subjective
 7 testimony regarding his pain and limitations. *See, e.g., Tonapetyan v. Halter*, 242 F.3d 1144,
 8 1147-48 (9th Cir. 2001). An ALJ may not reject a claimant's statements regarding his limitations
 9 merely because they are not supported by objective evidence. *Id.* at 1147; *Bunnell v. Sullivan*,
 10 947 F.2d 341, 345 (9th Cir.1991). In determining credibility, an ALJ may engage in ordinary
 11 techniques of credibility evaluation, such as considering claimant's reputation for truthfulness
 12 and inconsistencies in claimant's testimony. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir.
 13 2005).

14 **III. DISCUSSION**

15 **A. The ALJ's Findings**

16 At step one, the ALJ found that Plaintiff had not performed disqualifying work during
 17 the period (Tr. 19 [finding # 1]). At step two the ALJ found Plaintiff had ““severe’ impairments”
 18 (Tr. 19 [finding # 2]) including diabetes and asthma (Tr. 14). At step three, the ALJ determined
 19 that none of the impairments met the criteria of any impairment presumed to establish disability
 20 (Tr. 19 [finding # 2]). At step four, the ALJ found that the Plaintiff did not possess sufficient
 21 Residual Functional Capacity (“RFC”) to perform either of his past occupations (Tr. 19 [finding
 22 # 5]). In assessing Plaintiff's RFC, the ALJ found Plaintiff's “allegations of disabling pain”
 23 were “not credible” (Tr. 19 [finding # 3]), rejected the opinions of treating doctors as to
 24 Plaintiff's capacity, and found Plaintiff could perform the exertions for “sedentary exertional
 25 work” (Tr. 19 [findings ## 4, 8]). At step five, the ALJ made the unfavorable determinative
 26 finding that with such RFC Plaintiff could have performed work in jobs which existed in
 27 significant numbers, as shown by Medical-Vocational Guidelines (or“grids”) Rule 201.25 and
 28 the testimony of a vocational expert (Tr. 19 [finding # 10]).

1 Plaintiff takes issue with the ALJ's RFC determination, claiming that it was based the
2 ALJ's improper rejection of the opinions of his treating physicians and his own testimony about
3 his pain and limitations.

4 1. Rejection of Treating Physicians' Opinions

5 Plaintiff claims that the ALJ erred by not providing specific, legitimate reasons for
6 rejecting the opinions of his treating physicians, Dr. Lum and Dr. Wehner. In this case, the
7 opinions of Dr. Lum and Dr. Wehner were contradicted by the opinion of Dr. Gable, the
8 consultative examiner. (Tr. 15, 124-130). Dr. Gable examined Plaintiff on August 26, 2004 and
9 found no physical findings to support a claim of asthma under poor control. Dr. Gable's
10 physical examination of Plaintiff revealed excellent breath sounds and completely clear lungs.
11 Moreover, Dr. Gable noted that the fact that Plaintiff had not required emergency room treatment
12 or hospitalization cast further doubt on Plaintiff's complaints about asthma. (Tr. 15, Exh. 4F at
13 p. 2). Dr. Gable also performed a musculoskeletal examination which revealed well-developed
14 muscles with no atrophy, normal range of motion of all joints, no deformity, heat, swelling or
15 redness; a normal grip strength, mild kyphosis (curvature of the spine), and negative Tinel's and
16 Phalen's signs (tests for carpal tunnel system). Based on his examination, Dr. Gable assessed the
17 Plaintiff had the ability to lift, push or pull up to 25 pounds frequently and 50 pounds
18 occasionally; stand and/or walk for 6 hours in an 8 hour day; sit for 6 hours in an 8 hour workday
19 and occasionally to frequently squat. (Tr. 15, Exh. 4F at p.3.) Dr. Gable also noted that Plaintiff
20 originally wrote only diabetes as his chief complaint and later expanded this to state breathing
21 troubles.

22 Because the treating physicians were contradicted by the examining physician, the ALJ
23 was only required to provide specific and legitimate reasons for rejecting the opinions. An ALJ
24 may reject a treating opinion which is conclusory and unsupported by the record as a whole or
25 by objective medical findings. *Batson v. Commissioner of the Social Security Administration*,
26 359 F.3d 1190, 1195 (9th Cir. 2004) citing *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.
27 2001).

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1 a. Dr. Lum's Opinion

2 The ALJ specifically found that Dr. Lum's opinion was not supported by the treatment
 3 records and was "conclusionary in form with little in the way of clinical findings to support its
 4 conclusion." (Tr. At 17.) The ALJ found that Dr. Lum's records do not contain any laboratory
 5 tests such as x-rays or MRI scans which would support his opinion. The ALJ also noted that Dr.
 6 Lum stated an onset date of July 16, 2004, giving the limitations a duration of less than twelve
 7 months as of the date of the decision (issued May 18, 2005) and no longitudinal confirmation of
 8 consistently severe limitations that would preclude the performance of sedentary exertional
 9 work.

10 Additionally, Dr. Lum opined that Plaintiff suffered from diabetic neuropathy
 11 which caused pain or discomfort and limited his ability to use his lower extremities. (TR 106-
 12 107.) However, there are no treatment records that support the opinion; the treatment records
 13 from December 2003 through March 2005 document only one complaint for "occasional neck
 14 and hand joint pain" in January 2005, four months prior to the alleged onset date. (Tr. 177.).
 15 Moreover, Dr. Lum opined that Plaintiff was restricted from twisting, stopping,
 16 crouching/squatting, and climbing. (Tr. 148, 155.) The records contain no documentation of any
 17 testing regarding Plaintiff's abilities to perform these activities or even any complaints about
 18 these activities. (TR. 158-179.) Finally, Dr. Lum opined that Plaintiff was incapable of
 19 tolerating even low stress jobs (Tr. 145, 153.) Again, there is nothing in Dr. Lum's treatment
 20 records to support that opinion. Accordingly, the ALJ properly found that Dr. Lum's opinion
 was entitled to only minimal weight.²

21 b. Dr. Wehner's Opinion

22 Dr. Wehner did not issue his opinion until June 10, 2005, one month after the ALJ's
 23 decision. The opinion was considered by the Appeals Council. The Appeals Council found that
 24 Dr. Wehner's opinion was not consistent with his prior treatment records. (Tr. 6.) The Appeals
 25 Council found Dr. Wehner's opinion indicating significant limitations "not consistent with his
 26 findings in November 2004 for stable asthma followed by slight improvement in February 2005

27 2In Reply, Plaintiff does not address the shortcomings alleged by the ALJ and the Defendant.
 28 Plaintiff merely asserts without any support that "Plaintiff tested as having reaction to many
 common substances present in many workplaces."

1 with moderate obstruction reported on lung testing.” (Tr. 6.) The spirometry showed improved
 2 airflow and Plaintiff reported only a single asthmatic episode in the prior three weeks. (Tr. 193,
 3 195). The single episode resolved within twenty-four hours. Moreover, Dr. Wehner opined that
 4 Plaintiff was incapable of lifting more than ten pounds occasionally; could occasionally twist,
 5 stoop, and climb stairs; could rarely crouch/squat; but could never climb ladders (Tr. 212).
 6 However, Plaintiff only reported to Dr. Wehner that he was unable to walk more than one block
 7 and did not make any other complaints. (Tr. 210). Plaintiff argues that the other activities were
 8 properly restricted because they required more effort than walking a single block. Plaintiff does
 9 not cite any authority for this proposition and the court is not persuaded that inability to walk
 10 more than one block necessarily translates to an inability to twist, lift, stoop and crouch.
 11 Accordingly, the Appeals Council properly found that specific and legitimate reasons to reject
 12 the opinion of Dr. Wehner.

13 2. Rejection of Claimant's Subjective Pain Testimony

14 Plaintiff argues that the ALJ improperly discounted Plaintiff's reports of his symptoms.
 15 Plaintiff testified that every day he coughs and cannot breathe comfortably. (Tr. 237). He also
 16 testified that it is hard for him to sleep and that he has joint, hand and leg pain and that he cannot
 17 grip or hold items or straighten his fingers. (Tr. 238-239.) Plaintiff asserts that the ALJ did not
 18 articulate specific, clear and convincing reasons for rejecting this testimony. The ALJ noted in
 19 her decision that Plaintiff's subjective complaints were not credible in light of the discrepancies
 20 between his testimony and the difficulties he reported to his doctors. In particular, the ALJ noted
 21 that the Plaintiff claimed to have difficulty grasping items due to hand pain but had not reported
 22 any hand pain in the adjudicative period.³ Similarly, Plaintiff testified as to daily debilitating
 23 asthma symptoms, but did not report such symptoms to Dr. Wehner. (Tr. 190-200). In fact, on
 24 February 8, 2005, Plaintiff reported only one incident in the prior three weeks, despite having
 25 last been seen in November of 2004. In addition, Plaintiff did not report any debilitating

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³The record does contain one mention in January 16, 2004, but that is before the alleged onset
 date of the disability. (Tr. 177.)

1 symptoms or episodes to Dr. Lum. (Tr. 158-168.)⁴ Plaintiff argues that the joint pain was not
 2 disproved by lack of medical attention. The ALJ did not find that the joint pain was disproven.
 3 Instead the ALJ relied upon the inconsistency between Plaintiff's testimony and the problems he
 4 reported to his treating physicians.

5 Thus, the ALJ properly relied upon Plaintiff's inconsistent statements about his
 6 difficulties to discount his testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.
 7 2002)(ALJ properly considered Plaintiffs inconsistent statements in evaluating subjective
 8 reporting). In *Thomas*, the ALJ relied in part upon the claimants statement that she could cook,
 9 do dishes, wash laundry and go shopping to discount her reporting of her pain. Similarly, here
 10 Plaintiff reported that he makes his own meals, cleans, does laundry and irons. In addition he
 11 cares for his son and checks on his parents. (Tr. 73-75.)

12 Finally, Plaintiff argues that the ALJ improperly failed to consider the Function Report of
 13 Lay Witness Denise Sancehz - a friend of the Plaintiff. Lay evidence may be discounted only
 14 with specific findings. *Nguyen v. Chater*, 100 F.3d 1462 (9th Cir. 1996). The ALJ did
 15 improperly fail to explain the rejection of Ms. Sanchez' report. However, such error was
 16 harmless. Ms. Sanchez reported spending 4-5 hours daily with Plaintiff, but could provide no
 17 information about Plaintiff's activities other than taking his son to school. (Tr. 81.) Although
 18 she noted that Plaintiff lives with his son, she also reported that Plaintiff did not take care of any
 19 else such as a child. (Tr. 82.) Moreover, Ms. Sanchez' report that Plaintiff has trouble holding
 20 things in his hands is contradicted by the fact that he never made that complaint to his treating
 21 physicians during the adjudicative period. *See Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001)
 22 (ALJ may discount lay testimony in conflict with medical evidence.) Finally, Ms. Sanchez did
 23 not report that Plaintiff could not perform any functions. In response to the question "What was
 24 the disabled person able to do before his/her illnesses, injuries, or conditions that he/she can't do
 25 now?", she stated only that he "has trouble walking, talking, holding things in his hands, legs

27 ⁴Moreover, the ALJ relied upon the lack of Emergency Room visits or Hospitalization due to
 28 asthma in discounting the severity claimed by Plaintiff. Plaintiff argues that daily chronic
 symptoms would not necessarily lead to hospital visits. However, it was reasonable for the ALJ
 to believe that daily debilitating symptoms would lead at least once to a visit to a hospital.

1 buckle leg pains.” Thus, the report of Ms. Sanchez is not probative and any failure to give
2 reasons why the report was discounted is harmless.

3 || IV. CONCLUSION

4 For the Foregoing reasons, IT IS HEREBY ORDERED that Plaintiff's motion for
5 summary judgment is denied and Defendant's cross motion for summary judgment is granted.

6 || Dated: February 14, 2007

Patricia V. Trumbull
PATRICIA V. TRUMBULL
United States Magistrate Judge